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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. HECTOR HERNANDEZ, Defendant and Appellant.	B208411 (Los Angeles County Super. Ct. No. LA058732)

APPEAL from an order of the Superior Court of Los Angeles County. Susan M. Speer, Judge. Modified and affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Voet, Deputy Attorney General, for Plaintiff and Respondent.

Hector Hernandez appeals from an order granting probation, following his plea of no contest to one misdemeanor count of inflicting corporal injury on a spouse, cohabitant, or mother of one's child. (Pen. Code, § 273.5, subd. (a); undesignated section references are to that code.) He contends that the probation condition of consent to search was erroneous, because it exceeded the plea agreement and also was not related to the offense or to future criminality. We conclude that appellant's second contention is correct. We therefore modify the probation order by striking the search condition, and affirm the order as modified.

FACTS

The information charged appellant with committing a violation of section 273.5, subdivision (a) against C. R., his girlfriend and mother of his child. The evidence at the preliminary hearing showed that after Ms. R. told appellant it was none of his business whom she was talking to on the phone, appellant slapped her face, and they engaged in a fight, during which he kicked Ms. R. in the back and hit her head, causing a lump.

The trial court recited the plea agreement as being that appellant would plead no contest to the charge, as a misdemeanor, and be placed on summary probation for three years. As conditions of probation, he would serve 260 days in jail and 10 days of public service, and would pay a $400 domestic violence assessment and complete a 12-month domestic violence program, together with other conditions stated on a form, which appellant said he had read, signed, and understood. Appellant entered his plea, and the court imposed judgment, reciting the terms of the agreement and further conditions of probation. They included that appellant not possess dangerous weapons, and that he obey a protective order against annoying, approaching, or contacting C. R., except with respect to court-ordered visitation. The court also revoked and reinstated appellant's probation on a 2006 conviction under section 273.5.

At this point, the prosecutor requested that the court order "a search or seizure condition." When defense counsel urged there had not been any contraband or weapons, justifying a search, the court added, "We don't typically do that on misdemeanors. I

don't know if legally we can or not." The prosecutor repeated her request, and the court ruled, "Okay. I guess we'll challenge the legality when it comes up."

The court then told appellant, "You are ordered to submit your property to search or seizure at any time of the day or night by any probation officer or other peace officer with or without a warrant or probable cause."[1] The court inquired whether appellant still understood and accepted the terms and conditions of probation, and appellant answered "Yes, ma'am."

DISCUSSION

Appellant contends that for two reasons the search condition was improperly imposed on him. First, relying on *People v. Segura* (2008) 44 Cal.4th 921, appellant argues that the condition exceeded the terms of his plea agreement, and could not be added without his consent. Second, appellant contends that imposition of the search condition was an abuse of discretion, because the condition was not reasonably related either to appellant's offense or to future criminality. (See *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) Because we find merit in appellant's second contention, we need not address the first one.

We note initially appellant has properly preserved his claim. Appellant objected to the substantive basis for the search condition when it was proposed, and his subsequent renewed acceptance of the conditions of probation was not a waiver of that objection.

Under section 1203.1, subdivision (j), a court that grants probation may impose certain statutory conditions, and also "other reasonable conditions" appropriate to the breach of law or for the probationer's reformation and rehabilitation. The Supreme Court has declared the following measure of a probation condition's propriety: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .'

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[1] The minutes state that the submission-to-search condition (search condition) extended to appellant's person as well as his property. The parties do not question that this was the court's intent.

[Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Lent, supra,* 15 Cal.3d at p. 486 (fn. omitted.) (Test restated in *People v. Olguin* (2008) 45 Cal.4th 375, 379.)

There is no dispute that this search condition relates to conduct which is not itself criminal; indeed, the searches it would authorize would ordinarily be restricted by the Fourth Amendment. The validity of such a condition therefore turns on whether it relates to the crime of which the defendant was convicted, or to future criminality. (*Lent, supra,* 15 Cal.3d at p. 486.) Where the circumstances of the conviction have involved narcotics or a concealed weapon, the requisite relationship has been found. (E.g., *People v. Mason* (1971) 5 Cal.3d 759, 764; *People v. Wardlow* (1991) 227 Cal.App.3d 360, 366.) On the other hand, in serious assault cases that did not involve a concealed weapon, search conditions have been held not related to the offense (*People v. Kay* (1973) 36 Cal.App.3d 759, 761) or to prevention of the defendant's future criminality (*People v. Burton* (1981) 117 Cal.App.3d 382, 390-391).

The most extensive analysis of the propriety of a search condition under *Lent, supra,* 15 Cal.3d 481, appears in *In re Martinez* (1978) 86 Cal.App.3d 577 (*Martinez*). There the court disapproved the condition, as imposed on a defendant who had been charged with felonious assault on a police officer, and had pled guilty to misdemeanor battery on an officer (§ 243, subd. (b)). The defendant had thrown a beer can at a police car, "shattering glass and spewing beer over the officer." (*Martinez,* 86 Cal.App.3d at p. 579.)

After noting that the offense had not involved a concealed weapon, and that the search condition therefore was unrelated to the charged offense, the court (Compton, J.) addressed the *Lent* element of relation to future criminality. The court rejected the general rationale that searching all probationers "could abstractly be related to preventing future crime." (*Martinez, supra,* 86 Cal.App.3d at p. 583.) Rather, "[t]here must be a factual 'nexus' between the crime, defendant's manifested propensities, and the probation condition. [Citations.] There must be some rational factual basis for projecting the

possibility that the defendant may commit a particular type of crime in the future, in order for such projection to serve as a basis for a particular condition of probation." (*Ibid.*)

Here, the court concluded, the defendant's conduct, although serious, had been treated by the prosecution as a misdemeanor. "Further, nothing in the defendant's past history or in the circumstances of the offense indicate a propensity on the part of the defendant to resort to the use of concealed weapons in the future." (*Martinez, supra,* 86 Cal.App.3d at p. 583.) The circumstances were insufficient to support the search condition, which involved surrendering defendant's fundamental constitutional rights. (*Id.* at p. 584.)

Similar considerations prevail in the present case. Appellant's instant misdemeanor conviction arose out of a domestic assault on appellant's cohabitant, and did not involve the use of any weapons. The record does not indicate that this incident, or appellant's previous conviction of the same offense, in any way involved narcotics. The search condition thus was not related to the crime. Nor was it specifically related to any prospect of future criminal behavior by appellant.

The authorities respondent cites in support of the instant search condition do not validate it. Some of them based their approval of a search condition on the involvement of drugs in the commission of the offense. (*People v. Wardlow, supra,* 227 Cal.App.3d at pp. 366-367; *People v. Bauer* (1989) 211 Cal.App.3d 937, 943.) Others relied on the utility of the condition to the probation officer, in policing compliance with other probationary terms. (*People v. Adams* (1990) 224 Cal.App.3d 705, 712; see *People v. Balestra* (1999) 76 Cal.App.4th 57, 69.) Those cases are particularly inapposite, because appellant was placed on summary, unsupervised probation

Moreover, the record in this case reflects a rather mechanical selection and imposition of the search condition. The trial court granted it essentially in response to the prosecutor's insistence, and expressly reserved determining the legality of the condition until it was invoked in the future. The search condition having failed the test of *Lent, supra,* 15 Cal.3d 481, its imposition was an abuse of discretion. (See *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

DISPOSITION

The order granting probation is modified by striking the condition that appellant submit his person and property to search at any time by any law enforcement officer or probation officer with or without a warrant or probable cause. As modified, the order is affirmed.

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BAUER, J.*

I concur:

RUBIN, Acting P. J.

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

People v. Hernandez, B208411

BIGELOW, J.

I respectfully dissent.

The majority concludes that in this domestic violence case it is an abuse of discretion to impose search and seizure conditions of probation under the holding in *People v. Lent* (1975) 15 Cal.3d 481, 486. It is true that *earlier case law* held that search and seizure conditions can only be imposed on a probationer in cases where there is something more than mere assaultive behavior, i.e., where a weapon or narcotics are involved. More recently, our Supreme Court has recognized that the purpose of search and seizure conditions is to ascertain a probationer's compliance with the terms of probation, including the requirement to obey all laws, and thus the condition may appropriately imposed in a broader category of cases.

In *People v. Olguin* (2008) 45 Cal.4th 375, 380-381 (*Olguin*), the court held that " 'probation conditions authorizing searches 'aid in deterring further offenses . . . .and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.' [Citation.] A condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, 'reasonably related to future criminality.' [Citations.]"

Olguin cited with approval to *People v. Balestra* (1999) 76 Cal.App.4th 57, in which our colleagues in Division One of the Fourth District Court of Appeal held that a trial court did not abuse its discretion in imposing a warrantless search condition in an elder abuse case, which factually did not involve theft, narcotics, or firearms. The court stated, "[a]s our Supreme Court has recently (and repeatedly) made clear, a warrantless search condition is intended to ensure that the subject thereof is obeying the fundamental condition of all grants of probation, that is, the usual requirement (as here) that a probationer 'obey all laws.' Thus, warrantless search conditions serve a valid

rehabilitative purpose, and because such a search condition is necessarily justified by its rehabilitative purpose, it is of no moment whether the underlying offense is reasonably related to theft, narcotics, or firearms: 'The threat of a suspicionless search is fully consistent with the deterrent purposes of the search condition. " ' The purpose of an unexpected, unprovoked search of defendant is to ascertain whether [the probationer] is complying with the terms of [probation]; to determine not only whether he disobeys the law, but also whether he obeys the law. *Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant.* . . .' " [Citations.]' [fn. omitted] [Citation.] [¶] That this proposition is correct cannot be doubted." (*Id*. at p. 67, italics original.)

In a domestic violence case such as this, the ability to monitor defendant's compliance with the law while on probation is a valuable tool in attempting to insure he does not reoffend. Because of the danger of recidivism in domestic violence cases, a search and seizure condition is manifestly reasonable. Domestic violence cases often involve evidence that would be revealed during a search, including threatening messages, emails, and the presence of weapons. A failure to monitor a probationer's compliance with the law can lead to disastrous consequences in a domestic violence setting. The California Supreme Court has sanctioned search and seizure conditions of probation for this very purpose. The search condition was lawfully imposed in this case, and I would affirm the judgment.

BIGELOW, J.